DAVID VITTER
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WASHINGTON, D.C.
HART SENATE OFFICE BUILDING
SUITE SH-516
WASHINGTON, DC 20510
(202) 224-4623
FAX (202) 228-5061

BATON ROUGE
858 CONVENTION STREET
BATON ROUGE, LA 70802
(225) 383-0331
FAX (225) 383-0952

Website with E-Mail Access:
vitter.senate.gov

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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35506

WESTERN COAL TRAFFIC LEAGUE
PETITION FOR A DECLARATORY ORDER

STATEMENT FOR THE RECORD
UNITED STATES SENATOR DAVID VITTER

Mr. Chairman and Members of the Board, I file these comments as a United States Senator concerned about the effect of the impending decision of this Board on my Louisiana constituents that are captive rail customers of the BNSF Railway Company. I appreciate the focus that the Board has given this attempt by the BNSF Railway to inflate its assets for regulatory purposes by a portion of the acquisition premium that Berkshire Hathaway paid for the outstanding shares of the railroad company. Berkshire Hathaway paid this premium, of course, both because it valued the shares above current market value and because Berkshire Hathaway wanted to ensure purchase of all outstanding shares of stock. BNSF now seeks to inflate the value of its assets, for regulatory purposes, by this premium that it did not pay or invest in its system, but rather that was paid by Berkshire Hathaway.

Early in this process, before it was clear that BNSF actually would file documents with the Board claiming a write-up in the value of its assets due to a portion of this acquisition premium, I joined nine colleagues in writing you about our concerns on March 22, 2011. Thank you for responding to that communication and for your focus on this matter and for not only seeking comments, but also conducting a hearing on this subject on Thursday, March 22, 2012.

My philosophy of government is that the nation should rely as much as possible on markets to govern the relationship between producers and consumers. I recognize the purchase of all the stock of one of our largest railroad companies by one of our largest investment funds to be an unusual transaction, but this purchase is not, in and of itself, troubling to me. I am not troubled that a company that pays a high price for another company would attempt to recoup part of that price through more efficient operations or even price increases so long as those price increases occur in competitive markets. I am, however, deeply troubled when a company pays a high price for another company and the purchased company then attempts to recoup the investment of its buyer by raising its prices on a group of consumers that it holds captive and, thus, who are not protected by the market, in this case the transportation market.

I would hope and assume that the Chairman and Members of this Board would be equally concerned about this scenario, particularly when it is the duty of this Board to protect captive rail customers who cannot rely on the market for protection.

From my perspective, this accounting trick by the BNSF Railway looks like an attempt to force captive rail customers of the BNSF to pay the railroad at least part of the premium Berkshire Hathaway paid to purchase BNSF. I suspect a number of rail customers of BNSF will have the same view. Therefore, before you make a final decision in this matter, I would encourage the Board to obtain answers to the following questions:

- Will allowing the proposed changes in the BNSF filing of uniform rail costing factors allow the BNSF to increase any of its rates to captive rail customers automatically?

- Will allowing the changes in rail accounting practices proposed by the BNSF make it any harder for any captive rail customer of the BNSF to gain access to the STB to make its case for rate protection from the STB?

- Will allowing the changes in rail accounting practices proposed by the BNSF make the BNSF appear to be even more "revenue inadequate" under the Board's current test? If so, why would the Board allow these changes? One area in which the Board's credibility is in question is the Board frequent official view that a major railroad is "revenue inadequate" while Wall Street and most investors – and the railroads themselves in their presentations to financial markets – view the railroads as being financially robust. Indeed, Berkshire Hathaway shareholder letters for the last two years have raved about the financial performance of the BNSF while this Board continues to view BNSF as being "revenue inadequate."

- What is the public policy justification for a major railroad that has been purchased by a capital fund to collect a portion of the premium paid by that fund for the railroad from the railroad's customers that have no choice but to purchase their rail transportation from the railroad? Did the purchase premium improve the physical plant of the railroad? Did the purchase premium increase the service of the railroad to its captive customers? Is the railroad only proposing to collect from its captive rail customers because it can?

- Does BNSF need to employ this "accounting trick" to gain access to capital necessary to ensure the financial viability of BNSF Railway Company? This would not seem to be the case here based on the remarkable statements about the financial performance of BNSF that are contained in the 2011 and 2012 annual Berkshire Hathaway shareholder letters.

I share these questions with the Board because these are the questions that I have as I have analyzed this proposal by BNSF. As I ask and obtain answers to these questions, I can find no public policy reason to allow this proposed write-up of the assets of BNSF. If there is a compelling reason to allow this write-up of assets for regulatory purposes, I will be interested to learn more about it. Otherwise, I respectfully encourage the Board to reject this proposal by BNSF.

Sincerely,

David Vitter
United States Senate